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U.S. Citizenship and Immigration Services

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APR 28 2004

FILE: SRC 01 189 60163 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a manufacturer and embroidery designer that seeks to employ the beneficiary as an industrial manager. The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation, and the AAO affirmed the denial.

On motion, counsel states that the AAO's analysis and subsequent denial is inconsistent with precedent decisions. Counsel delineates the duties of the proffered position and contends that it corresponds to the specialty occupation of operations research manager. Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in The Department of Labor's *Dictionary of Occupational Titles* (*DOT*) (4th Ed., Rev. 1991); counsel refers to two cases to claim that the AAO should follow the DOT. Counsel claims, furthermore, that the AAO misinterprets the educational requirements of the DOL's *Occupational Outlook Handbook* (the *Handbook*). Counsel also relies upon *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) to state that a petitioner's size, annual income, and past hiring practices are irrelevant in determining whether a position qualifies as a specialty occupation. Finally, counsel submits an educational evaluation from International Education Council and several federal court cases.

The petitioner's submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner submits evidence; however, the evidence does not constitute new facts. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must have been previously unavailable and could not have been discovered earlier in the proceedings. *See* 8 C.F.R. § 1003.2(c)(1). Here, the evidence submitted on motion supports the same assertions that counsel made on appeal: that the *Handbook* demonstrates that the proffered position is a specialty occupation. In addition, although counsel states that the duties of the proffered position are parallel to the specialty occupation of operations research manager, no documentary evidence is submitted to support this statement.

With respect to counsel's reference to the *DOT*, it should be noted that the DOL has replaced the *DOT* with the *Occupational Information Network* (*O*Net*). Both the *DOT and O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of the occupation. Instead, the DOL's *Occupational Outlook Handbook* (the *Handbook*) provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within an occupation.

The educational evaluation from International Education Council also does not constitute new facts because the dismissal of the appeal by the AAO was not based upon the beneficiary's qualifications. The AAO dismissed the appeal because the petitioner failed to establish that the proffered position qualifies as a

specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A). In the decision, the AAO had merely noted that, had the proffered position qualified as a specialty occupation, the petitioner failed to demonstrate that the beneficiary was qualified to perform the position's duties.

The evidence also fails to satisfy the requirements of a motion to reconsider. Counsel relies upon *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) to state that a petitioner's size, annual income, and past hiring practices are irrelevant in determining whether a position qualifies as a specialty occupation. The AAO finds that counsel's statement and supporting evidence is without merit. The AAO's dismissal of the appeal was not based upon the petitioner's size and annual income. Moreover, the AAO routinely addresses a petitioner's past hiring practices to determine whether the petitioner has established the third criterion: that it normally requires a degree or its equivalent for the proffered position.

Another of counsel's assertions is that the director misinterpreted the educational requirements of an industrial manager, as described in the *Handbook,* by finding that an industrial manager does not require a bachelor's degree in a specific specialty. Counsel states that marketing positions are considered specialty occupations even though the *Handbook* reports that employers accept a wide range of educational backgrounds for this type of position.

The AAO finds unpersuasive counsel's assertions. Counsel fails to support his assertions with pertinent precedent decisions or establish how the AAO misinterpreted the evidence of record. For example, counsel submits no evidence to support his assertion that a marketing position is a specialty occupation.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated March 25, 2002, is affirmed. The petition is denied.